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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 72, 87, 290 and 291

J. D. SHELLEY, ET AL., PETITIONERS,

v.

LOUIS KRAEMER and FERN E. KRAEMER.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

ORSEL McGHEE and MINNIE S. McGHEE, PETITIONERS,

v.

BENJAMIN J. SIPES, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

JAMES M. HURD, ET AL., PETITIONERS,

v.

FREDERIC E. HODGE, *et al.*

RAPHAEL G. URCIOLO, ET AL., PETITIONERS,

v.

FREDERIC E. HODGE, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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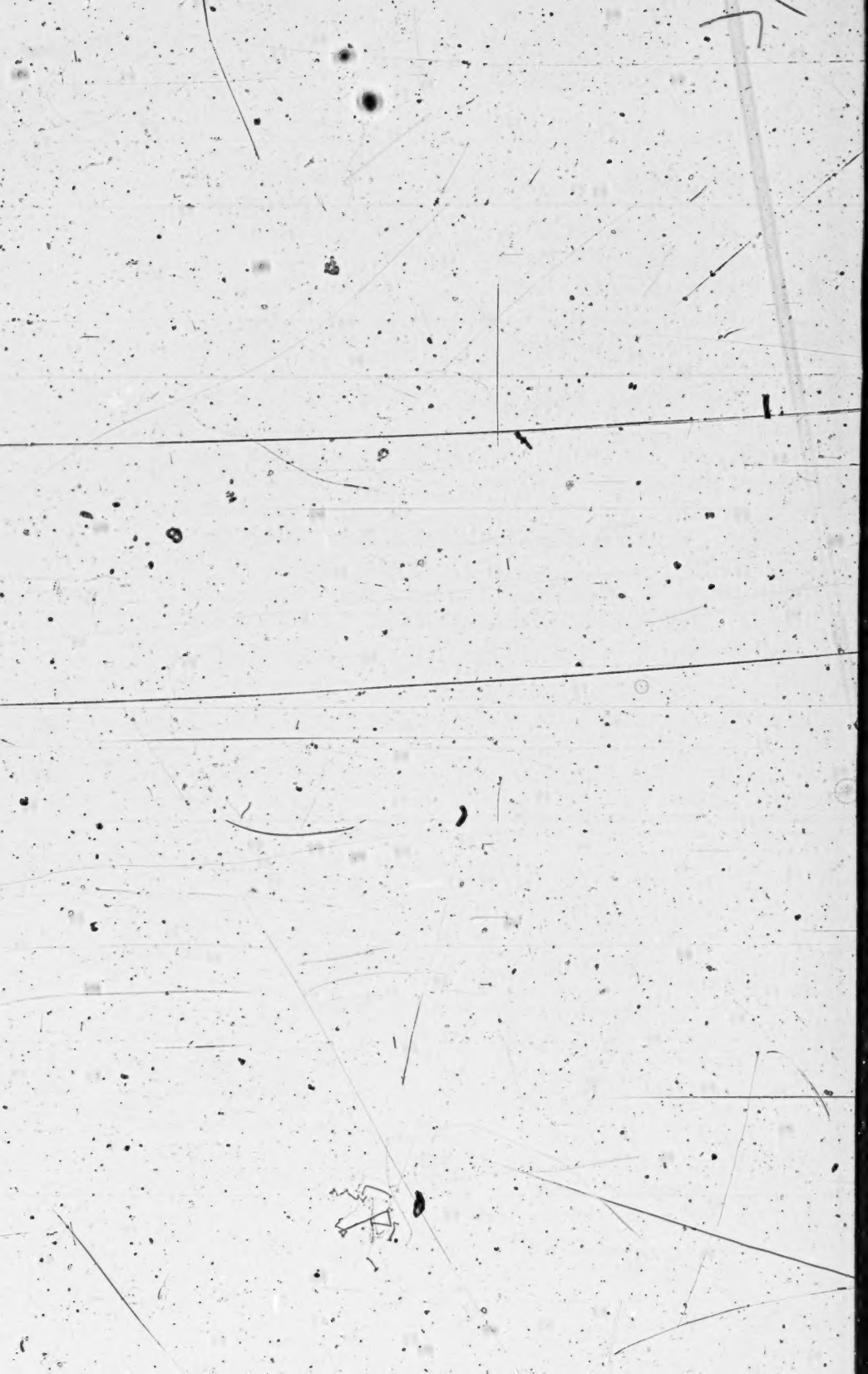

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of the American Civil Liberties Union

This brief is filed with the consent of the parties. The American Civil Liberties Union is a non-profit, non-partisan organization having a nation-wide membership of

persons of all racial origins and religious views, including citizens of Michigan and of Missouri, and residents of the District of Columbia. It is devoted to the preservation and protection of the fundamental liberties guaranteed citizens of this country by Federal and State constitutions.

We are filing a brief *amicus curiae* in these cases because the problem of racial discrimination in housing is a most serious threat to American civil liberties. In the development of a sound democracy it matters little whether the discrimination exercised be overt or discreet. In either event, basic freedoms guaranteed by the Bill of Rights are undermined.

Restrictive covenants of the character here in issue may on their face appear to be merely private expressions of intolerance. If they were merely such, they would not concern us, however deplorable the sentiments might be. When, however, the state is requested to enforce them to the injury of a minority, the problem becomes public and intimately involves the purposes for which this organization was established.

Statement of the Case

These are four suits, the common purpose of which is to enforce by injunction certain arrangements entered into by former owners of real property in the cities of St. Louis, Missouri, Detroit, Michigan, and Washington, D. C., pursuant to which such owners agreed, in the Missouri and Michigan cases, that the occupancy by Negroes of such property would not be permitted, and in the two cases involving property in Washington, D. C., that neither occupancy nor ownership by Negroes of such property would be permitted. In all these cases the purpose of the respective agreements was to maintain the respective com-

munities which they affected as white residential neighborhoods and to prevent Negroes from living in such communities.

In *Shelley* v. *Kraemer*, No. 72, the agreement was entered into in 1911, involved a St. Louis community, was to be effective for fifty years, and prohibited occupancy by any person not of the Caucasian race under penalty of forfeiture of the property.

In *McGhee* v. *Sipes*, No. 87, the agreement was entered into in 1934, involved a Detroit community, was to be effective for twenty-five years, and prohibited use or occupancy by any persons except those of the Caucasian race, without specifying a penalty. In this case, the instrument imposing the restriction recited that its purpose was "defining, recording and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed." It was also provided that the restriction was not to become effective until at least eighty percent of the frontage on the block was subject to the restriction or a similar one.

In *Hurd* v. *Hodge* and *Urciolo* v. *Hodge*, Nos. 290 and 291, both cases involve the validity of the same restrictive deed covenant, involving a Washington, D. C. community, expressed in the following terms: "Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two Thousand Dollars * * *, which shall be a lien against said property."

In all of these cases, through intermediate conveyances, title to the property in litigation became vested in a white person who sold to Negroes for occupancy by them. In each case, such a sale is attacked by another signer of the agreement (or a successor to his interest), or owner

of neighboring property, who has no property interest in the land sought to be transferred. In each case, the plaintiff demands that a state or local court issue an injunction to overturn the transfer and to evict the Negro purchaser from property for which he has paid and which he is now occupying.

In the St. Louis case, the defendant Negro purchasers were successful in the trial court on a non-federal ground, but the judgment was reversed on appeal and it was directed that the relief sought by the plaintiffs be granted. In the Detroit case, the decree of the trial court granting the relief sought by the plaintiffs was affirmed on appeal, as was also done in the Washington, D. C., cases, where one Justice of the Court of Appeals for the District of Columbia dissented from the affirmance by that court.

POINT I

Enforcement by state or local court injunction of these racial restrictive covenants constitutes state action prohibited by the due process and equal protection clauses of the Fourteenth Amendment* and by the Civil Rights Laws passed by Congress in implementation thereof.

A. If such enforcement be deemed state action, it violates the due process and equal protection clauses of the Fourteenth Amendment, as well as the provisions of 8 U.S.C.A., §§41 and 42.

Congress enacted under the Thirteenth Amendment and re-enacted under the Fourteenth Amendment two

* Hereinafter, when general reference is made to the due process and equal protection clauses of the Fourteenth Amendment, it is to be understood as referring also to the due process clause of the Fifth Amendment, insofar as application to the two instant cases arising in the District of Columbia is concerned.

statutes which now appear as 8 U.S.C.A., Sections 41 and 42, which provide as follows:

> §41. Equal rights under the law.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> §42. Property rights of citizens.
>
> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Court held in 1917 that a municipal ordinance which in substance forbade Negroes to occupy property in a predominantly White area, and forbade Whites to occupy property in a predominantly Negro area, was invalid as contravening the due process clause of the Fourteenth Amendment. *Buchanan* v. *Warley*, 245 U. S. 60. More specifically, the holding in the *Buchanan* case was that the Fourteenth Amendment protected the right to acquire, use and dispose of property free of restrictions on racial grounds, and in reaching this conclusion the Court relied upon the language of the statutes quoted above, particularly 8 U.S.C.A. §42.

This Court subsequently reaffirmed the principle of the *Buchanan* case, that state action discriminating against Negroes by segregating them as to housing facilities is

unconstitutional and in violation of the Civil Rights Laws. *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *Richmond* v. *Deans*, 281 U. S. 704 (1930). It is true that these three cases all involved one particular form of discriminatory state action—*viz.*, legislation. We shall now turn to the problem of whether there is state action in the instant cases.

B. Such enforcement does constitute state action, and therefore is unconstitutional and invalid as contravening federal law.

What is here involved is judicial action. Such action, like any other governmental action, must be scrutinized in the light of the constitutional command. The enforcement by a court of substantive rules of common law in such a way as to deprive persons of civil liberties guaranteed by the Bill of Rights has repeatedly been held by this Court to be a denial of due process of law under the Fourteenth Amendment. *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769 (1942); *Bridges* v. *California*, 314 U. S. 252 (1941); *A. F. of L.* v. *Swing*, 312 U. S. 321 (1941); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).* Likewise, the action of a court in denying the equal protection of the laws is state action forbidden by the Four-

* Cf. *Corrigan* v. *Buckley*, 271 U. S. 323 (1926), discussed *infra*, where, in dismissing for want of jurisdiction an appeal from a decision of the Court of Appeals for the District of Columbia which had sustained the validity of a restrictive covenant, this Court implicitly recognized the obvious fact that the enforcement of such a covenant by a court of equity involves the application of substantive rules of common law. There the Court said: "* * * we cannot determine upon the merits the contentions earnestly pressed by the defendants in this Court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired." (271 U. S. 323, at 332.)

teenth Amendment. *Hysler* v. *Florida*, 315 U. S. 411 (1942); *Howard* v. *Fleming*, 191 U. S. 126 (1903).

The fact that the origin of the judicial action is a private covenant is wholly immaterial, since the covenant is not self-executing. As long as they remain mere private agreements, these racial restrictive covenants are not unconstitutional, but when the state acts to compel observance, it takes forbidden action.*

This Court has never decided the question whether state or local court injunctions enforcing racial restrictive covenants contravene constitutional guarantees.

Corrigan v. *Buckley*, 271 U. S. 323 (1926), which is pressed upon this Court as authority that the covenants in these cases can be enforced by injunction without transgressing constitutional guarantees, did not reach this question. It is submitted that the courts which have cited that case as such authority have misunderstood that decision and have accepted it as establishing a proposition of law which was not involved.

The only argument which the Court in the *Corrigan* case passed upon was that the covenant itself, as distinguished from the state action through which it was enforced, was unconstitutional under the Fifth, Thirteenth and Fourteenth Amendments. This the Court specifically stated:

> "Under the pleadings in the present case the only constitutional question was that arising under the assertions in the motion to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments." (329-30)

* See McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 Cal. L. Rev. 5, at 21 (1945).

The opinion of the Court further states clearly that the issue of state action was raised for the first time in the Supreme Court and was therefore not to be considered:

> "And, while it was further urged in this court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the court of appeals or in this court; and it likewise is lacking in substance." (331)

In such circumstances the statement that the contention "likewise is lacking in substance" is the clearest *dictum*, and should certainly not be binding upon this Court when the issue is properly presented. *Corrigan* v. *Buckley* was, of course, dismissed for want of jurisdiction, no constitutional question having been considered on the merits. Even for the narrow point decided, the case has been cited only once by this Court in the twenty years which have elapsed since its decision. *United States* v. *Johnson*, 327 U. S. 106, 113 (1946).

Moreover, the constitutional problem presented by restrictive covenants in the light of the fact that they are substantially zoning ordinances was not even mentioned, possibly because the fact situations which give rise to the constitutional question did not then exist and more probably because no substantial data had yet been collected on the subject. Twenty years ago, not only were

restrictive covenants far less prevalent than they are today, but the urbanization of the Negro was still a new social phenomenon and the problem was by no means so acute. See the dissenting opinion of Edgerton, J. in *Mays* v. *Burgess*, 147 F. (2d) 869, 876 *et seq.* (C.A.D.C., 1945), tracing the development of the problem in the District of Columbia alone since *Corrigan* v. *Buckley*.

The case was also decided before the importance of racial restrictive covenants was realized, and before the implications of a decision upholding such covenants could be fully understood. As late as 1922, the Report of the Chicago Commission on Race Relations, *The Negro in Chicago*, a study of the race riots in Chicago in 1919, which devoted some 125 pages (106-230) to the distribution of the Negro population and its housing problem, and discussed in some detail the methods used by property owners to exclude Negroes from White areas, did not seem to consider restrictive covenants worthy of mention as a factor in segregation. Evidently covenants were then not yet considered an important factor in this situation.*

The earliest reported case dealing with an anti-Negro restriction, *Queensborough Land Co.* v. *Cazeaux*, 136 La. 723, 67 So. 641, 1916B L.R.A. 1201 (1915) antedates *Corrigan* v. *Buckley* by little more than a decade. Less than half a dozen additional cases appear to have been

* The extent and importance of racial restrictive covenants today may be abundantly documented. We shall limit ourselves here to citing but three references: The recent Report of the President's Committee on Civil Rights, *"To Secure These Rights"*, U. S. Government Printing Office, Washington, D. C. (1947), pp. 68-70; dealing particularly with the situation in the District of Columbia, the dissenting opinion of Edgerton, J., in the Court of Appeals in two of the instant cases, *Hurd* v. *Hodge*, 162 F. (2d) 233, 242-246; and, perhaps most important, *"Social and Economic Aspects of Segregation and their Relations to Residential Race Restrictive Covenants"* (mimeographed publication, Sept., 1947), The American Council on Race Relations, 32 West Randolph St., Chicago 1, Ill. Chapter V of the last-mentioned publication, the most extensive recent study on the subject, deals specifically with the nature, extent, and operation of racial restrictive covenants.

reported in the period intervening.** And *Corrigan* v. *Buckley* was itself the first anti-Negro restriction case reported in the federal courts.

Furthermore, not only were the facts, as they were known at the time of *Corrigan* v. *Buckley*, too hazy to focus the constitutional problem of private racial zoning enforced by governmental authority as it is now presented, but the law with respect to state action constituting a violation of the Fourteenth Amendment was also far too little developed to present the question which is now before this Court. *United States* v. *Classic*, 313 U. S. 299 (1941), made necessary the reconsideration of *Grovey* v. *Townsend*, 295 U. S. 45 (1935), in the light of the cases which had previously upheld the rights of Negroes to vote. *Marsh* v. *Alabama*, 326 U. S. 501 (1946), discussed in detail *infra*, requires a first consideration on the merits, in the light of *Buchanan* v. *Warley*, of what *Corrigan* v. *Buckley* is alleged to have decided, but did not actually decide.

It is noteworthy that the earliest reported case in an American jurisdiction in which the validity of a racial restrictive covenant was considered, *Gandolfo* v. *Hartman*, 49 Fed. 181 (C. C., Calif., 1892), held that its enforcement by injunction would be in violation of the Fourteenth Amendment. That case appears to be the only federal case prior to *Corrigan* v. *Buckley* in which such a question was raised. There the restriction was directed against Chinese rather than Negroes, but the principles involved and the arguments presented were the same as

** *Koehler* v. *Rowland*, 275 Mo. 573, 205 S. W. 217 (1918); *Los Angeles Investment Co.* v. *Gary*, 181 Cal. 680, 186 Pac. 596 (1919); *Title Guarantee and Trust Co.* v. *Garrott*, 42 Cal. App. 152 (1919); *Parmalee* v. *Morris*, 218 Mich. 625, 188 N. W. 330 (1922); *Porter* v. *Barrett*, 233 Mich. 373, 206 N. W. 532, 42 A.L.R. 1267 (1925), are the only such cases which counsel have discovered.

those in the anti-Negro cases. The usual "private action" argument to the effect that there was no legislation involved and hence that the Fourteenth Amendment did not apply was apparently pressed on the court. In answer the opinion stated:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, *which the courts may enforce*. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by the contract of individual citizens than by legislation, *and the courts should no more enforce the one than the other.*" (Italics added.)

This case was, of course, decided almost a decade after the *Civil Rights Cases*, 109 U. S. 3 (1883), had established that the Fourteenth Amendment was protection only against governmental action and not against the activities of individuals in a private capacity. This makes even more clear what would have not been particularly doubtful from the language of the opinion alone, that the court did not rely on any mistaken interpretation of the Fourteenth Amendment, by reason of which the restrictive agreement could itself be void, but based the holding on a conclusion that judicial enforcement of the restriction would be prohibited governmental action. It is unnecessary to speculate on the question whether the court considered itself bound, in what may have been a

diversity case, by whatever restrictions would have been applicable to the action of state courts in the premises, for no different result could have been reached on the basis of the Fifth Amendment.

Gandolfo v. *Hartman* appears to have been overlooked in the decision of *Corrigan* v. *Buckley,* both in the Court of Appeals and in this Court. The persuasiveness of the views there stated, plus the fact that they seem to have been subsequently overlooked, is another reason for the reconsideration of the *Corrigan* v. *Buckley* dictum at this time.

Inasmuch as these covenants amount to racial zoning ordinances, the action of a state in enforcing them is prohibited state action regardless of the fact that the covenants do not originate through official action.

The constitutional problem presented by these cases is brought into focus only when the community function of racial restrictive covenants is recognized. These covenants are not simply agreements among individuals limiting the use of land owned by them; they are, in effect, racial zoning ordinances, an instrument through the use of which the exclusion of one or more races from living space in the community is sought to be achieved, and is in fact achieved. It is the application of the power of the state to accomplish this prohibited objective which, we urge, is unconstitutional state action. The constitutional issue is somewhat obscured when litigation is presented in the form of a single property owner seeking to enforce a covenant which perhaps extends only over a single block against a single Negro purchaser. Once it is recognized, however, that no plaintiff is, as a practical matter, interested merely in keeping a particular parcel from being occupied by a Negro family, and that

in the ordinary case the covenant would be at once abandoned if only such a limited objective could be achieved, it becomes apparent that in every case the plaintiff seeks through state action to establish and maintain a racial zoning ordinance. And thus the constitutional problem is unavoidably presented.*

Respondents urge that the enforcement of the covenants decreed below is distinguishable from what was condemned in *Buchanan* v. *Warley* because the restriction there was promulgated by public authority while in these cases it is the work of individuals. A short answer is that in both cases it is the machinery of government, and only the machinery of government, which makes the restriction effective. But in any event it is without legal consequence, in the determination of the constitutional issue, whether the discrimination is essentially that of private persons which the courts simply enforce or whether the state, by attaching the sanctions of its courts and officers to the covenants, is itself guilty of direct discrimination. The more recent decisions of this Court reveal an approach to the question of state action far too realistic to permit the court to be misled by the appearance of private action where essentially public matters are involved.

Marsh v. *Alabama*, 326 U. S. 501 (1946), is only the latest in a series of cases developing this approach. Such decisions have settled that the discriminatory use of public

* Although no exact figures seem to have been compiled to show the extent to which residential property in cities is covered by racial restrictive covenants, there appears to be an increased tendency toward the use of such covenants. See references cited in Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 Univ. Chi. L. Rev. 198, 203-5 (1945). A recent study of the situation in an area constituting approximately two-thirds of the City of Chicago indicated that of the 155 sections contained in the area being studied, 70 were assigned to nonresidential use and, of the remaining 85, 30 were covenanted against Negroes. *American Council on Race Relations, op. cit. supra* note p. 9, at p. 106. Another recent survey found that of 315 subdivisions opened in the last ten years in Queens, Nassau, and southern Westchester Counties of New York State, 83% of all subdivisions of 75 houses or more are barred to Negroes. *Architectural Forum*, October, 1947, p. 16. Similar studies in other localities might be expected to result in similar findings.

or quasi-public powers by persons in whom such powers are vested either explicitly or implicitly is no less unconstitutional than direct legislation or other more obviously governmental action such as that under consideration in *Buchanan* v. *Warley.** In *Marsh* v. *Alabama,* it will be remembered, the proprietors of a company-owned town, who owned in fee all of the land in the town, including the streets, denied Marsh access to such streets when she sought to go upon them for the purpose of distributing religious literature. It had previously been held by this Court that the right to distribute such literature in the public streets was guaranteed by the First and Fourteenth Amendments. Marsh having refused to leave these "private" premises, she was convicted of violating a local statute which made trespass after warning a crime. This Court held that the conviction was state action in violation of the guarantees of the Fourteenth Amendment. In the light of the nature of the property in question and the purpose sought to be achieved through the exercise of the property rights, this Court held that Alabama was compelled by the Constitution to prefer the rights of freedom of press and of religion guaranteed by the Constitution to members of a community over rights flowing from ownership of property. In upholding Marsh's exercise of her constitutional rights on the "private" streets in question, this Court took the view that the property rights of the owners of a town, like the property rights of the owners of a highway dedicated to public use, are circumscribed by the constitutional rights of members of the public:

> "Whether a corporation or a municipality owns or possesses the town the public in either case has

* See Tefft, *Marsh* v. *Alabama*—A Suggestion Concerning Racial Restrictive Covenants, Vol. IV, National Bar J., No. 2, p. 133 (June, 1946).

> an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments of the Constitution." (326 U. S. 507-8)

The effect of this language is clear. When the state empowers members of the community to restrict the purposes to which their respective properties may be put and makes the powers of the state available for the enforcement of such restrictions, the members of the community are not justified in adopting for the entire community restrictions the effect of which is to deny constitutional rights. State law which enforces such action by punishing those who refuse to acquiesce in such a deprivation of constitutional rights violates the Fourteenth Amendment.

It is true that in *Marsh* v. *Alabama* this Court took cognizance of the fact that:

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." (326 U. S. 501, at 509).

It is also true that in that case the state had taken legislative action. On the other hand, in the instant cases the property interest asserted does not attain even the dignity of an interest in land. It is a mere covenant, and as such should be of little weight as against the constitutional guarantee here sought to be avoided in derogation of a right to housing, which Justice Holmes so aptly described as "a necessary of life." *Block* v. *Hirsh*, 256 U. S. 135, at 156 (1921).

It should be remembered, moreover, that the interests of plaintiffs in the instant cases are exceedingly remote, they seeking to enforce mere covenants as distinguished from interests in land, which covenants, moreover, cover land not their own.

In the *Marsh* case, the Court took pains to indicate that an important factor in its decision was that many persons live in such company-owned towns and that to uphold the view taken by the Alabama Supreme Court would tend to deprive all of such people of the constitutional guarantees of freedom of press and of religion (326 U. S. 508). Similar considerations are involved here, although we are dealing with different constitutional guarantees. Indeed, there is every reason to suppose that the number of persons affected by racial restrictive covenants far exceeds the number of the inhabitants of company-owned towns. To uphold the covenants in issue is not simply to deny the right to retain their property to the defendants in these particular suits. It is to permit in substance the promulgation of private laws, endowed with the most potent of governmental enforcing powers, and requiring the exclusion of an entire race and perhaps other races from housing facilities. And all this on the basis of the prejudices of individuals who have no property interest in the facilities so denied.

Having earlier in the opinion rejected the contention that the state action prohibiting and punishing the exercise of constitutional rights was justified because it had reference only to private property, with the statement that "Ownership does not always mean absolute dominion", this Court stated in summing up:

> "In our view the circumstances that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." (326 U. S. 509.)

Also relevant to decision in these restrictive covenant cases is the view taken by this Court in regard to state action in *Smith* v. *Allwright*, 321 U. S. 649 (1944). There it was also urged that effective discriminatory action by "private" agencies, permitted by a state, in a field in which the Constitution prohibits racial discrimination, was private action to which the guarantees of the Fourteenth Amendment had no relevance. There, it will be recalled, the case was that the Democratic Party of Texas had by resolution of its state convention excluded Negroes from membership and hence from participation in the Democratic primary. The Negro plaintiff was refused a Democratic ballot by the defendant election judges, and alleged that he had thereby been deprived of constitutional rights. The real question was whether it was state or private action that excluded Negroes from voting in the Democratic pri-

mary. Beginning with the proposition that the right to vote in primaries, as well as in general elections, is secured by the Constitution against denial on a racial basis through state action, this Court came to the conclusion that, where the state permitted the party to discriminate in the primary and then restricted the choice of the voters in the general election to the candidates so selected, the state by so adopting and enforcing the discrimination of the party made it state action. The Court said:

> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. Lane *v.* Wilson, 307 U. S. 268, 275, 83 L. ed. 1281, 1287, 59 S. Ct. 872.
>
> "The privilege of membership in a party may be, as this Court said in Grovey *v.* Townsend, 295 U. S. 45, 55, 79 L. ed. 1292, 1297, 98 A.L.R. 680, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state." (321 U. S. 664-5)

These restrictive covenant cases present a situation closely analogous to that before the Court in *Smith* v. *Allwright*. Here similarly it is clear, under the long-established and unquestioned rule of *Buchanan* v. *Warley*, *supra*, that the right to purchase and occupy property is protected by the Fourteenth Amendment against racial

discrimination through state authority. And here similarly it is urged that, although the state is implementing and enforcing the concerted acts of individuals, aimed at denying on racial grounds the right of ownership and occupancy of property, what is involved is essentially private action, with which the state has no concern. Yet here the state has not only, as in *Smith* v. *Allwright*, endorsed, adopted and enforced the discrimination practiced by individuals; it has effectuated the discrimination by the addition of sanctions of its own which it has superimposed on the discriminatory agreements created by the parties. As a practical matter, in the instant cases, it is only because such state sanctions have been imposed that these discriminatory arrangements are made effective. The power of the state imparts strength and vitality to discriminatory practices which might otherwise remain without force. That which the Constitution prevents the state from doing directly is accomplished by indirection if the state is permitted to seize upon the agreement of the parties as an excuse for the imposition of legal restraints which the parties without affirmative state intervention would be powerless to maintain.

True enough, in these cases the state has not by legislative action prohibited Negro use and occupancy of specific areas. It has not enacted an ordinance prohibiting such occupancy except with the consent of a specified number of persons of another race, as in *Harmon* v. *Tyler*, 273 U. S. 668 (1927). It has, however, vested the power to prohibit such occupancy in property owners for the time being, and this not simply as an ordinary incident of ownership of property, but regardless of such ownership and even in derogation of the ordinary property rights of other owners. It has permitted private persons to

make an essentially legislative determination effective for all time in the future, regardless of the wishes of subsequent owners of the land. Moreover, the state has by the action of its courts provided that, where Whites have agreed that Negroes should henceforth be excluded from a particular area, such an agreement once made shall have the force of a criminal sanction attached to a zoning law of similar purport. The power of the legislature to vest zoning functions in private groups or individuals has been closely limited. *Eubank* v. *Richmond*, 226 U. S. 137 (1912); *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116 (1928). That it may be vested in private individuals to be used for purposes of implementing racial discrimination is, it is submitted, completely inconceivable.

This Court has recognized the existence of discriminatory governmental action in situations where the incidence of such action was far less direct than in these restrictive covenant cases. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U. S. 192 (1944), involved a suit by a Negro railroad employee to enjoin the enforcement of a discriminatory agreement between a union and his employer. The Railway Labor Act made the union the exclusive bargaining representative for the craft of which the plaintiff was a member. The Supreme Court of Alabama affirmed a judgment dismissing the suit. This Court characterized the decision as follows:

> "It (the Alabama court) construed the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working

conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them." (323 U. S. 198) (parentheses added).

This Court, however, recognized that such a holding presented a constitutional question:

"If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading."

It must be noted that the discrimination in the *Steele* case was far less clearly state action than that which is involved here. For in the restrictive covenant cases the discrimination cannot be effective except through the intervention of the machinery of government. There was no showing in the *Steele* case that the union could not

have achieved its discriminatory purpose without the power specially conferred upon it by statute. Nonetheless, a construction of the statute as permitting the union to discriminate was conceived to be sufficient to raise a constitutional question. Far more obvious is the case where the discrimination is directly imposed by a state agency, without the aid of which private efforts to discriminate would be unavailing. If the Constitution prevents a labor union from imposing racial discrimination where the union is presumably capable of enforcing its policy without the aid of state action, it is difficult to understand how the Constitution can permit a court, itself the instrumentality of a state, to impose racial discrimination where the persons at whose behest the court acts are incapable of enforcing such a policy except with the aid of the court and the machinery of government which it sets in motion.

Of course, the Court in the *Steele* case, applying familiar principles of constitutional law, endeavored to avoid the constitutional question posed by Mr. Chief Justice Stone at the beginning of the opinion by construing the statute to require the union to use its bargaining powers in non-discriminatory fashion. But this result had to be reached through interpretation and despite the absence of specific language, so that Mr. Justice Murphy, concurring, suggested that such a construction could be justified only on the ground of necessity, because "otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment * * *" (323 U. S., at 208)

The right of individual property owners to dispose each of his own property as his individual interest or tastes may dictate, and to enforce such right through governmental aid, is not involved in these cases, and would not under ordinary circumstances raise any question of constitutionality.

The constitutional issue involved in these cases, although highly important, is nonetheless narrow. It must not be confused with the issue presented by the *Civil Rights Cases,* 109 U. S. 3 (1883) and the line of decisions following them. That issue would be presented if petitioners contended that the Constitution forbids an owner of land, acting individually, to refuse on racial grounds to permit a particular person to occupy or to purchase his property. The *Civil Rights Cases* hold that nothing in the Fourteenth Amendment prohibits such discrimination. Where the landlord resorts to judicial process to enforce his policy of racial discrimination, there is clearly state action and the doctrine of the *Civil Rights Cases* is not directly applicable. See Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals,* 6 Lawyers Guild Rev. 627 (1946). But even such a case falls far short of presenting the constitutional issue raised when a racial restrictive covenant is enforced.

In each case it is necessary to strike a balance between the constitutional policies forbidding racial discrimination and the policies protecting the individual's free use and disposition of his private property. State action which enforces the preference of an individual in respect of his own parcel of land, where no substantial public interest is involved, may conceivably in such a balance be held free of the taint of unconstitutionality. Thus far, perhaps, the doctrine of the *Civil Rights Cases* may be pressed.

But even such a rule falls far short of sustaining racially discriminatory state action which prefers the exclusion of a race from a community to the non-recognition of the interest of an individual in his neighbor's or his neighbor's neighbor's property. The *Civil Rights Cases* clearly imply that a situation where the discrimination is established or enforced through state action falls within the ambit of protection afforded by the Fourteenth Amendment:

> "Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the States by the 14th Amendment are forbidden to deny to any person? And is the Constitution violated *until the denial of the right has some state sanction or authority?* Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and *presumably subject to redress by those laws until the contrary appears?*" (109 U. S. at 24; italics supplied.)

It cannot be successfully contended that these covenants may be enforced by the courts because they are contracts among private parties. The Negro defendants in restrictive covenant cases are not parties to the restrictions; indeed, in the cases before the Court, even their immediate grantors were not.

In any event, the contention that the courts must enforce these restrictions because they are contracts is question-

begging. The instances in which courts refuse to enforce contracts because of overriding rules of law which preclude enforcement are too numerous even to require illustration. The basic question in these cases is whether under the Constitution and in the circumstances surrounding these restrictive covenants, which give them scope and meaning, state courts are entitled to prefer notions of contract to Constitutional and statutory guarantees that property may be acquired without racial discrimination.

More specifically, granting *arguendo* the pertinence of the fact that in certain instances a party to a contract may surrender his own Constitutional right, the question is whether he can, by making a contract, surrender the Constitutional right *which someone else has in his freedom.* The excellent analysis of this question made recently by Professor Hale is particularly pertinent at this point:

> "It will be recalled that in *Truax* v. *Raich* (239 U. S. 33, 1915) it was said that the alien employee had 'manifest interest' in the freedom of the employer to employ him; and the state's destruction of that freedom was held to violate a constitutional right of the alien. And in *Buchanan* v. *Warley* a constitutional right of the white owner was held to be violated when the state denied freedom to a Negro to buy and occupy the property. By the same token, of course, if the state denied freedom to a white owner to sell to a Negro, it would violate the Negro's constitutional right to buy from a willing seller. The Negro has 'manifest interest' in the white owner's freedom to sell. But if the state court will compel the white man not to sell to a Negro, even though he is now willing to do so, because the white owner has covenanted with other white owners not to do so, the state is defeating the Negro's interest in the white man's freedom, to which the Negro is supposed to have a consti-

tutional right. The state could not have done this to the Negro in the absence of the covenant. If it may do so by enforcing the covenant, the parties to the covenant have taken from him his constitutional right. He himself had no part in making the contract by virtue of which it has disappeared. The Negro has made no contract by which he has given up his constitutional right. The parties to the covenant have given up, not only their own constitutional rights, as they may well do, but also the constitutional rights of other people. * * *"

Hale, *Rights under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 Lawyers Guild Review 627, 633-4 (1946). (Parentheses added.)

Restrictive covenants may not be granted enforcement on the principle of reciprocity expressed to the effect that Negroes have an equal right to establish and enforce restrictive covenants barring White people from their areas. The allowance of such a theoretical right to exclude is no answer to a Negro family which cannot find a place to live. As Mr. Justice Cardozo, when Chief Judge of the New York Court of Appeals, said of another equalitarian provision of the Constitution (Article IV, Section 2):

"We are not to whittle it down by refinement of exception or by implication of a reciprocal advantage that is merely trivial or specious."

Smith v. *Loughman*, 245 N. Y. 486, 496, 157 N. E. 753, 757 (1927).

Furthermore, it may be noted, the immunity guaranteed by the equal protection clause of the Fourteenth Amendment is an individual one and may be claimed by an indi-

vidual regardless of how the restrictive power complained of affects other individuals. *McCabe v. Atchison, Topeka and Santa Fe Ry. Co.*, 235 U. S. 151, 161, 162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1938).

POINT II

By virtue of the supremacy clause of the Federal Constitution, the United Nations Charter, a treaty of the United States which condemns racial discrimination, represents the overriding public policy of the United States. By virtue of this treaty, the restrictive covenants here in question must be stricken down by this Court as against the public policy of the United States.

A. The United Nations Charter, a treaty to which the United States was a party, establishes the public policy of the United States that there shall be no discrimination against individuals on account of race.

Under the Charter of the United Nations, ratified by the United States Senate, the United States solemnly undertook, together with the other signatories, to promote freedom for all, without distinction as to race or religion.

Thus, Article 55c of the Charter provides that:

> "* * * the United Nations shall promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

And in conjunction therewith, Article 56 states:

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The intention is clear.

This Court has never determined the validity of restrictive covenants in the light of the foregoing international commitments of the United States. Although not arising in the courts of the United States, a particularly pertinent case is *Re Drummond Wren,* 4 D.L.R. 674 (1945). That case is especially illuminating because in it the Supreme Court of Ontario held a restrictive covenant invalid on the ground, among others, that international pacts such as the Charter of the United Nations established a policy of non-discrimination.

The restrictive covenant involved in *Re Drummond Wren* was directed against Jews. In the instant case the covenant is directed against Negroes. The two types of covenants are equally repulsive and destructive of a free democratic society.

In that case Judge Mackay said:

> "My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate" (4 D.L.R., at p. 679).

It should be noted that Articles 55 and 56 of the United Nations Charter, above quoted, were specifically called to the attention of the Supreme Court of Missouri by petitioners in *Shelley* v. *Kraemer,* No. 72, in their Motion for Rehearing before that Court (Record, pp. 166 and 167).

B. By virtue of Article VI, clause 2 of the Federal Constitution, this public policy of the United States overrides any conflicting state or local policy rule.

Such undertakings by the United States in its international relations are declared by the Constitution to be the "supreme law of the land":

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Article VI, clause 2).

The overriding effect of treaties has been repeatedly and consistently demonstrated by decisions of this Court, since the early days of the Constitution. *Ware* v. *Hylton*, 3 Dall. 199 (1796); *Kennett* v. *Chambers*, 14 How. 38 (1852)*; *Hauenstein* v. *Lynham*, 100 U. S. 483 (1879); *Geofroy* v. *Riggs*, 133 U. S. 258 (1890); *Missouri* v. *Holland*, 252 U. S. 416 (1920); *Nielsen* v. *Johnson*, 279 U. S. 47 (1929).

Special interest may attach to *U. S.* v. *Pink*, 315 U. S. 203 (1942), which involved something less than a treaty, and which declared New York law immaterial, in view of the Litvinov agreement between the United States and Russia, on the disposition to foreign creditors of the assets of a liquidated Russian insurance company; and to *Missouri* v. *Holland*, *supra*, upholding the Federal govern-

* This case was a principal basis of the decision in *Gandolfo* v. *Hartman*, 49 Fed. 181 (C. C., Calif., 1892), *supra*, denying enforcement of a covenant not to rent to Chinese persons. The court ruled that enforcement would violate the most favored nation clause of a treaty between the United States and China, whereby the United States Government promised that Chinese residing here would be treated with the same respect accorded to other peoples.

ment's right to enforce, as against the reserved rights of the states, the Migratory Bird Treaty Act enacted pursuant to treaty between the United States and Great Britain.

The history of *Missouri* v. *Holland* is instructive in its demonstration of a principle implicit in the cases cited above (particularly *Hauenstein* v. *Lynham*), namely, that the treaty-making power, unlike the legislative powers of Congress, is not limited by any concept of powers constitutionally reserved to the states. Before the Migratory Bird Treaty was signed, Congress had attempted regulation, purportedly under the commerce clause, and it was held to have exceeded its powers and violated states' rights. *U. S.* v. *Shauver*, 214 Fed. 154 (D. C., E. D. Ark. 1914); *U. S.* v. *McCullagh*, 221 Fed. 288 (D. C. Kans. 1915). But subsequently, in execution of treaty obligations, Congress could legislate on the same matter; the Migratory Bird Treaty Act was passed and sustained, in *Missouri* v. *Holland*.

It follows that this Court must void the restrictive covenants here in question as contrary to the overriding public policy of the United States.

Conclusion

The review by this Court of the instant cases is important and timely. The crucial importance for the individual of the right of access to housing on equal terms, without discrimination because of race, color, or creed, may be and has been extensively documented. We submit that it requires but little effort of the imagination, aided by what may be easily observed, to bring home to any fair-minded and thinking citizen what the moral and physical effects of such discrimination must be upon its victims. While we do not assert that the right of nondiscriminatory access to housing is as basic or entitled to as preferred a position as the freedoms of speech, press, assembly and religion, it is nevertheless clear, if the measure of relative importance to the individual and the community be applied, that this right must be placed not far behind.

It is appropriate that this Court be now asked to do here what it has recently done in other cases of comparable importance—to strip away the transparent mask of "private action" and to recognize the reality of effective governmental coercion underneath. Coming before this Court, as it does, at a time when all agencies of our Government have just been called upon to strengthen the enforcement of basic civil rights,* we are confident that this issue will be decided in a way to increase public confidence that such rights are now as ever the safe wards of those most directly concerned with their protection and support.

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*"*To Secure These Rights*", Report of the President's Committee on Civil Rights, U. S. Government Printing Office, Washington, D. C. (1947). With particular reference to the extent and effect of racial restrictive covenants, see *id.*, pp. 68-70.

We respectfully submit that court enforcement by injunction of the restrictive covenants in question is plainly unconstitutional and in contravention of Federal law, and that the covenants themselves are void as contrary to the public policy of the United States.

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